

(3) Any objection made during the examination must be noted by the officer taking the deposition. After the objection is noted, the deponent must answer the question, unless a claim of privilege is asserted or the presiding officer rules otherwise.

(4) The deposition must be transcribed verbatim.

(d) *Nonstenographic means of recording; telephonic depositions.* Testimony at a deposition may be recorded by means other than stenography if all participants so stipulate or if the presiding officer, upon motion, so orders. Such stipulation or order shall designate the person before whom the deposition will be taken, and the manner in which the deposition will be preserved, filed, and certified. Depositions may also be taken by telephone, if all participants so stipulate or the presiding officer, upon motion, orders.

(e) *Officer taking deposition.* Depositions must be taken before an officer authorized to administer oaths or affirmations by the laws of the United States or of the place where the deposition is held. A deposition may not be taken before an officer who is a relative or employee or attorney of any of the participants, or is financially or in any other way interested in the action.

(f) *Submission to deponent.* (1) Unless examination is waived by the deponent, the transcription of the deposition must be submitted to the deponent for examination.

(2) If the deponent requests any changes in form or substance, the officer must enter the changes on the deposition transcript with a statement of the witness' reasons for the changes. The deponent must sign the deposition within 30 days after submittal to the deponent, unless the participants by stipulation waive the signing or the deponent cannot or will not sign. By signing the deposition the deponent certifies that the transcript is a true record of the testimony given.

(3) The officer who took the deposition must sign any deposition not signed by the deponent in accordance with this section and must state on the record that the signature is waived or that the deponent cannot or will not sign, accompanied by any reason given for a deponent's refusal to sign. If the

officer complies with this paragraph, a deposition that is unsigned by the deponent may be used as though signed, unless the presiding officer rules otherwise.

(g) *Certification and copies.* (1) The officer must certify on the transcript of the deposition that the deponent swore to or affirmed the truth of the testimony given and the deposition transcript is a true record of the testimony given by the deponent. The officer must provide the participant conducting the deposition with a copy of the transcription.

(2) Documents and things produced for inspection during the examination of the witness will, upon the request of a participant, be marked for identification and annexed to the deposition and the officer will certify the document or thing as the original offered during the deposition, or as a true and correct copy of the original offered.

(3) Copies of the transcript of a deposition may be purchased from the reporting service that made the transcription, subject to protections established by the presiding officer.

#### § 385.405 Use of depositions (Rule 405).

(a) *In general.* During a hearing, the hearing of a motion, or an interlocutory proceeding under Rule 715, any part or all of a deposition taken pursuant to Rule 404, so far as admissible as though the witness were then present and testifying, may be used against any participant who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the provisions of this section.

(1) If the deponent is a witness at a hearing, any participant may use the deposition of that witness at the time of the witness' examination to contradict, impeach, or complete the testimony of that witness.

(2) The deposition of a participant or of any person who, at the time of taking the deposition, was an officer, director, or managing agent of a participant, or a person designated under Rule 404(b)(3) to testify on behalf of a participant may be used by another participant for any purpose.

(3) The deposition of any witness, whether or not a participant, may be

used by a participant for any purpose, if the presiding officer finds that:

- (i) The witness is dead;
- (ii) The witness is unable to attend or testify because of age, illness, infirmity or imprisonment;
- (iii) The participant offering the deposition is unable after the exercise of due diligence to procure the attendance of the witness by subpoena; or
- (iv) Exceptional circumstances make it necessary in the interest of fairness with due regard to the importance of presenting the witness in open hearing, to allow use of the deposition.

(4) If only part of a deposition is offered in evidence by a participant, a participant may require the introduction of any other part which ought, in fairness, to be considered with the part introduced, and any adverse participant may introduce any other part.

(b) *Objections to admissibility.* No part of a deposition will constitute a part of the record in the proceeding, unless received in evidence by the Commission or presiding officer. Subject to paragraph (c) of this section, a participant may object to receiving into evidence all or part of any deposition for any reason that the evidence would be excluded if the deponent were present and testifying.

(c) *Effect of errors and irregularities in depositions.* (1) Any objection to the taking of a deposition based on errors or irregularities in notice of the deposition is waived, unless written objection is promptly served on the participant giving the notice.

(2) Any objection to the taking of a deposition based on the disqualification of the officer before whom it is to be taken is waived, unless the objection is made before the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) Any objection to the competency of the witness or the competency, relevancy, or materiality of testimony is not waived by failure to make the objection before or during the taking of the deposition, unless the basis for the objection might have been removed if the objection had been presented at the taking of the deposition.

(4) Any objection to errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions and answers, in the oath or affirmation, or in the conduct of participants, and errors of any kind that might be obviated, removed or cured if presented at the deposition, is waived unless objection is made at the taking of the deposition.

(5) Any objection based on errors or irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, endorsed, or otherwise dealt with by the officer is waived, unless the objection is made with reasonable promptness after the defect is, or with due diligence should have been, ascertained.

**§ 385.406 Data requests, interrogatories, and requests for production of documents or things (Rule 406).**

(a) *Availability.* Any participant may serve upon any other participant a written request to supply information, such as responses to data requests and interrogatories, or copies of documents.

(b) *Procedures.* (1) A request under this section must identify with specificity the information or material sought and will specify a reasonable time within which the matter sought must be furnished.

(2) Unless provided otherwise by the presiding officer, copies of any discovery request must be served upon the presiding officer and on all participants to the proceeding.

(3) Each discovery request must be answered separately and fully in writing.

(4) Responses to discovery requests are required to be served only on the participant requesting the information, Commission trial staff, and any other participant that specifically requests service. The presiding officer may direct that a copy of any responses be furnished to the presiding officer. Responses must be served within the time limit specified in the request or otherwise provided by the presiding officer.

(5) If the matter sought is not furnished, the responding participant must provide, in accordance with Rule